UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CITIMORTGAGE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 4:10-CV-01568
SIMONICH CORPORATION,	)	
	)	
Defendant.	)	

PLAINTIFF CITIMORTGAGE'S OPPOSITION TO DEFENDANT SIMONICH CORPORATION'S MOTION TO TRANSFER VENUE

The Court should deny Simonich's Motion to Transfer Venue because:

1. By contractual agreement, Simonich explicitly and irrevocably submitted to the jurisdiction of this forum and waived the defense of an inconvenient forum.

2. Simonich concedes that the forum-selection agreement precludes it from arguing that this forum is inconvenient for either party.

3. Notwithstanding the above, this venue—not the Northern District of California—is the most convenient forum. The agreement at issue was executed here, the loans at issue were sold and delivered to CitiMortgage here, CitiMortgage's principal place of business is here, and relevant documentation is here.

4. Simonich's argument is based solely on the supposed inconvenience of third-parties, who would not provide relevant testimony, and on the location of property that has no bearing on the issues in this case.

BACKGROUND

Plaintiff CitiMortgage, Inc. ("CitiMortgage" or "CMI") and Defendant Simonich Corporation ("Simonich") entered into a contract titled "Correspondent Agreement Form 200," dated April 29, 2004 (as amended, the "Agreement"). (Petition ¶ 2; Petition, Exhibit 1; Answer ¶ 2). The parties agreed that CitiMortgage could purchase loans from Simonich and that, in the event that a loan was defective, CitiMortgage could in its discretion demand that Simonich repurchase the loan. (Agreement, §§ 1, 11).

The parties further agreed that if a party brought a lawsuit to enforce rights under the Agreement, each party waives any defense of inconvenient forum if the lawsuit is filed in this Court:

> CMI and [Simonich] agree that any action, suit or proceeding to enforce or defend any right or obligation under this agreement or otherwise arising out of either party's performance under this Agreement shall be brought in . . . the United States District Court for the Eastern District of Missouri and each party irrevocably submits to the jurisdiction of [this] forum and waives the defense of an inconvenient forum . . . .

(Agreement, ¶ 12).

This lawsuit is based on Simonich's breach of the Agreement—*i.e.*, it refused to repurchase defective loans. (*See* Petition, *e.g.*, ¶¶ 4-7). CitiMortgage filed the lawsuit in this Court pursuant to Section 12 of the Agreement. (Petition ¶ 12).

The Agreement was executed in this District, the loans in dispute were sold and delivered to CitiMortgage in this District, CitiMortgage's principal place of business is in this District, and relevant documentation is in this District. (*See* Agreement, ¶ 1, p. 7; Declaration of Adrian Dick, submitted herewith).

ARGUMENT

A. The Court Should Deny The Motion Because Simonich Expressly Waived Its Right To Request Transfer To Another Venue

According to the United States Supreme Court, a forum selection clause "should control absent a strong showing that it should be set aside." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). "Forum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid for reasons such as fraud or overreaching." *M.B. Restaurants, Inc. v. CKE*

Restaurants, Inc., 183 F.3d 750, 752 (8th Cir. 1999). It is "incumbent on the party seeking to escape his contract to show that proceeding in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 727 (8th Cir. 2001) (quoting *M/S Bremen*, 407 U.S. at 18) (emphasis added).

In this case, the parties agreed that the Eastern District of Missouri is the appropriate forum: "[E]ach party irrevocably submits to the jurisdiction of [this] forum and waives the defense of an inconvenient forum . . . ." (Agreement, ¶ 12). This forum-selection clause is prima facie valid. *M.B. Restaurants, Inc.*, 183 F.3d at 752.

Simonich should be held to the terms of its Agreement. Simonich does not—and cannot—meet its burden of showing that proceeding in this Court is so "gravely inconvenient" that it will "for all practical purposes be deprived of its day in court." *See M/S Bremen*, 407 U.S. at 15, 18. Simonich altogether ignores the applicable legal standard. In fact, most of the cases that Simonich cites in support of transfer do not involve a forum-selection clause and thus have no bearing on the present issue. *See*, *e.g.*, *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923 (W.D. Mo. 1985) (no forum-selection clause); *Textron Fin. Corp. v. Krystal Koach, Inc.*, 2010 WL 2132662 (E.D. Mo. May 26, 2010) (same); *In re Apple, Inc.*, 602 F.3d 909 (8th Cir. 2010) (same); *Biometics, LLC v. New Womyn, Inc.*, 112 F. Supp.2d 869, 867 (E.D. Mo. 2000) (same). Quite simply, the forum-selection clause controls, and the Court should deny Simonich's Motion.

B. This Is The Most Convenient Forum And Simonich Concedes That It Cannot Argue Inconvenience To Itself

The parties' irrevocable submission to the venue of this Court aside, this forum—not the Northern District of California—is the most convenient forum. The contract was executed here, the loans at dispute were sold to and delivered to CitiMortgage here, CitiMortgage has its principal place of business here, and relevant files are here. Indeed, Simonich concedes that it cannot argue that it is inconvenienced. (Def. Motion, p. 3; see also section D below). Accordingly, consistent with the parties' agreement, this forum is convenient, and the Court should deny Simonich's Motion to Transfer Venue.

C. Simonich Requests Transfer Based On Irrelevancies

As discussed above, Simonich concedes that it cannot argue inconvenience to itself. Instead, Simonich urges transfer on the grounds of convenience to *others*—third parties, such as loan borrowers, mortgage brokers, and loan processors—and on the location of real estate underlying the loans. These matters are irrelevant.

i. *The Supposed Convenience of Individuals Whose Testimony Would Have No Bearing On This Case Is Irrelevant*

Testimony of third parties such as borrowers, brokers and processors is unnecessary and irrelevant. This is a straightforward breach of contract case. The Agreement requires Simonich to repurchase loans from CitiMortgage if, "in its sole and exclusive discretion," CitiMortgage determines that a loan is defective—*i.e.*, it " was underwritten and/or originated based on any materially inaccurate information or material misrepresentation made by the Loan borrower(s) . . . ." (Agreement, § 11).

The issue, then, is whether CitiMortgage exercised its discretion to demand repurchase. The actual behavior of the borrowers or any other persons involved in the loan origination is irrelevant to that inquiry. In other words, the existence of an actual, underlying defect in the loan is not relevant. Rather, the relevant issue is whether CitiMortgage in its discretion determined that there was a defect. If CitiMortgage had any basis to determine that a loan was defective, that alone sufficed to trigger Simonich's repurchase obligation. The basis for CitiMortgage's determination appears on or is reflected in certain documents in CitiMortgage's files—documents that CitiMortgage will produce in this case. Thus, this case should be decided on the basis of documents alone. Testimony from third parties is unnecessary and irrelevant.

ii. *The Location Of Real Estate Is Irrelevant*

Simonich also mistakenly relies on the location of the real estate underlying the loans. The location of those properties likewise bears no relevance to this dispute. This case concerns Simonich's refusal to repurchase loans, not the sale of real estate. The loans were sold in Missouri, to a company with its principal place of business in Missouri, pursuant to a contract executed in Missouri. The physical place of the real estate underlying those loans has no bearing on this dispute. The Court must deny Simonich's Motion.

D. Simonich's Reliance On The *Midwest Mechanical* Case Is Misplaced

Simonich's heavy reliance on a 1987 case from the Western District of Missouri, *Midwest Mech. Contractors v. Tampa Constructors, Inc.*, 659 F. Supp. 529, 531 (W.D. Mo 1987), is misplaced. If anything, the case demonstrates that the Court should not transfer this case. First, the facts at issue are not comparable. *Midwest Mech. Contractors* involved a dispute over construction contracts at a construction site in Florida with key witnesses in Florida. *Midwest Mech. Contractors*, 659 F. Supp. at 533. Plaintiff, who contested the motion to transfer venue to Florida, conceded that multiple key witnesses were in Florida. *Id.* In the present case, by contrast, the Agreement involves loans that were sold in Missouri, to a company with its principal place of business in Missouri, pursuant to a contract executed in Missouri, with key documents in Missouri. Furthermore, as discussed above, out-of-state third-parties cannot and will not offer relevant testimony.

Second, Simonich overlooks controlling precedent that supersedes *Midwest Mech. Contractors*—including at least two, more-recent Eighth Circuit cases, *M.B. Restaurants, Inc.*, 183 F.3d at 752 and *Dominium Austin Partners, L.L.C.*, 248 F.3d at 727. As discussed above, *M.B. Restaurants, Inc.* (decided in 1999) and *Dominium Austin Partners, L.L.C.* (decided in 2001) held that a forum-selection clause is prima facie enforceable and that a party seeking to disavow such a clause bears a heavy burden to prove that enforcement of the clause will result in grave injustice. *M.B. Restaurants,* *Inc.*, 183 F.3d at 752; *Dominium Austin Partners, L.L.C.*, 248 F.3d at 727. Simonich has not made—and cannot make—such a showing.

Third, in relying on *Midwest Mech. Contractors*, Simonich concedes that the forum-selection clause precludes it from arguing that it is inconvenienced by the case proceeding in this forum. Simonich contractually waived any such argument. Simonich quotes from *Midwest Mech. Contractors*: "[T]he convenience of the parties… is properly within the power of the parties themselves to affect by a forum-selection clause." (Def. Motion, p. 3, quoting *Midwest Mech. Contractors*, 659 F. Supp. at 531). Precluded from arguing that Simonich itself is inconvenienced, Simonich, again, hangs its hat on the supposed inconvenience of third-parties and the location of the real estate underlying the loans—matters which are irrelevant, as discussed above. This Court should not transfer venue.

CONCLUSION

For the reasons set forth above, the Court should deny Simonich's Motion for Transfer of Venue.

Dated: November 24, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of November, 2010 a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which I understand will send notification of such filing to the following:

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